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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT, INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U. S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations, *Petitioners,*

vs.

STATE OF UTAH, a body politic, *et. al.,* *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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STATE OF UTAH, a body politic, *et. al.,* *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet officially reported, but is appended to the Petition for a Writ of Certiorari as Appendix D at pages 33 through 39. This opinion replaced an opinion announced December 11, 1972, which is appended to the Petition as Appendix E at pages 40 through 48. The opinion of the trial court denying class action status to the instant action is reported at 49 F.R.D. 17 (C.D. Cal. 1969); and its opinion denying respondents' motions to intervene is reported at 50 F.R.D. 99 (C.D. Cal. 1970). These opinions are appended to the Petition for Certiorari as Appendixes B and C, respectively.

JURISDICTION

Respondents do not question the jurisdiction set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals correctly decided that respondents, who are members of an abortive class, are entitled to the benefit of the date of the commencement of a Sherman 1 class action for purpose of the statute of limitations.

STATUTES REGULATIONS AND RULES INVOLVED

The petition sets forth all pertinent statutes, rules and regulations.

STATEMENT OF THE CASE

On May 13, 1969, the State of Utah filed a complaint in the United States District Court for the District of Utah.[1] The complaint alleges violation of § 1 of the Sherman Antitrust Act[2] and seeks treble damages and injunctive relief arising out of the purchase of concrete and steel pipe. The State of Utah brought the action on behalf of itself and all of its lesser governmental entities that were end users of pipe acquired from the defendants, co-conspirators, and others.[3]

To give perspective to the issues presented in this petition, it is necessary to recount briefly the federal government's proceed-

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[1] R. 317-40 (Ex. G).

[2] 15 U.S.C. §1.

[3] The class alleged in the complaint was also broad enough to include all other states in the "Western Area" as therein defined, which had not previously filed a similar action, including Wyoming, Nevada and Idaho, and including their lesser governmental entities (R. 317, 318, 320-21).

ings involving concrete and steel pipe in the Western area. On March 10, 1964, a United States Grand Jury in the Southern District of California returned five indictments, each of which named certain individual defendants and two or more of the corporate defendants involved in the instant case, with the exception of Utah Concrete Pipe Company and W. R. White Company.[4] Each of the indictments charged the defendants named therein with combining and conspiring together in restraint of interstate trade in a specific product line of steel or concrete pipe in violation of § 1 of the Sherman Act, in that they submitted collusive and rigged bids for the sale of pipe and allocated and divided business among themselves. Pleas of *nolo contendere* were accepted by the court on June 19, 1964.[5] Subsequently, the United States filed five civil actions against various of the same corporate defendants. The civil complaints were based on facts uncovered by the Government in preparing its criminal indictments.[6] On October 28, 1964, the Government, seeking to restrain the defendants from continuing violations of § 1 of the Sherman Act[7] amended each of its five complaints by adding a new count pursuant to § 4 of the Sherman Act.[8]

On December 8, 1967, each of the defendants, with the exception of American Pipe and Construction Company, entered into consent decrees in each of the government civil cases in which they were named as defendants.[9] On May 24, 1968, a consent judgment was entered against American Pipe and Construction Company in each of the three government cases in which it had been named as a defendant.[10]

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[4] R. 8-46 (Ex. A).
[5] R. 48-68 (Ex. B).
[6] R. 70-134 (Ex. C).
[7] R. 136-228 (Ex. D).
[8] 15 U.S.C. §4.
[9] R. 230-84 (Ex. E).
[10] R. 286-315 (Ex. F).

The instant class action, alleging respondents to be members of the class, was commenced on May 13, 1969 — eleven days before the suspension period provided by § 5(b) of the Clayton Act[11] would have expired.[12] On August 28, 1969, pursuant to a motion of a majority of the defendants, the Judicial Panel on Multidistrict Litigation transferred the Utah case to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for coordinated or consolidated pretrial proceedings, pursuant to 28 U.S.C. § 1407.[13]

On November 14, 1969, the court granted defendants' motion for an order determining that the action should not be maintained as a class action,[14] stating:

> "In any event, the court can but conclude that the number of public entities in Utah, Wyoming, Nevada and Idaho who might have been injured by the alleged conspiracy could not possibly exceed the 350 cases heretofore filed by end users in the other states of the 'Western Area.' From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision that the joinder method heretofore proved successful. To the contrary, the fact of *joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule* 23(b)(3)." (Emphasis added.)[15]

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[11] 15 U.S.C. § 16(b).

[12] See Maricopa County v. American Pipe & Constr. Co., 303 F. Supp. 77 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970).

[13] *In re* West of the Rockies Concrete Pipe Antitrust Cases, 303 F. Supp. 507, 508 (J.P.M.L. 1969).

[14] R. 342-44 (Ex. H).

[15] R. 355; Utah v. American Pipe & Const. Co., 49 F.R.D. 17, 21. (C. D. Calif. 1969).

On December 4, 1969, the court entered its order that the class action could not be maintained.[16] Eight days later, on December 12, 1969, more than 60 lesser governmental entities of the State of Utah, including respondents, members of the abortive class, filed motions to intervene as plaintiffs.[17] Respondents had purchased substantial amounts of pipe from the defendants, co-conspirators and others.[18] While several of the respondents were aware of the class action before it was filed,[19] the majority could not be said to have knowingly relied upon the State's action. The State of Utah, however, did rely upon the class action as a vehicle through which the claims of all its lesser governmental entities could be presented to the court; and, upon the negative determination of the class, the State took steps to notify these entities which resulted in the motions to intervene.[20]

Following a hearing, the court on March 30, 1970, rendered its opinion on the applications to intervene.[21] In its opinion the court indicated that "the problem underlying all of the motions is that of the bar of the statute of limitations to the petitioners' complaints."[22] The court then stated that Rule 23 of the Federal Rules of Civil Procedure could not toll the antitrust statutes of limitation by any theory of relation back. Reasoning that §§ 4B[23]

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[16] R. 346-47 (Ex. I).

[17] R. 359-66. A supplemental motion to intervene was filed on December 29, 1969, for six additional applicants for intervention, R. 364.

[18] R. 389-438.

[19] R. 428-37.

[20] R. 528, 529, 538-40. One may presume that "class members situated in a given state would prefer to be represented by the attorney general for that jurisdiction." Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 494 (N.D. Ill. 1969).

[21] R. 447-65 (Ex. N); Utah v. American Pipe & Construction Co., 50 F.R.D. 99 (C.D. Calif. 1970).

[22] R. 449; 50 F.R.D. at 101.

[23] 15 U.S.C. § 15b.

and 5(b)[24] of the Clayton Act were substantive in nature, the court concluded:

> ". . . that within the statutorily created antitrust universe § 5(b) cannot be re-tolled by any Rule to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of § 5(b) has ended."[25]

The court denied leave to intervene with relation back for the purposes of the statute of limitations.[26] The court nevertheless held that the appellants' motions to intervene would be granted in the exercise of its discretion, as to the claims alleged for the four years preceding December 12, 1969, i..e, the period not then barred by § 4B of the Clayton Act.[27]

To secure an appealable final order, respondents amended paragraph 24 of their proposed complaint in intervention so as to limit their allegations of conspiracy to a date four years preceding the time of filing.[28] On July 8, 1970, the court entered its findings of fact, conclusions of law and order on the motions to intervene.[29] The court found that the tolling of the statute of limitations, based upon the government proceedings, ceased on May 24, 1969, and that the filing of a class action by the State of Utah, did not bring the intervenors within the period of limitation. Insofar as any of the proposed causes of action by respondents were based upon the government actions, the court held the same were barred by the applicable statute of limitations. The motions to intervene were then denied.

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[24] 15 U.S.C. § 16(b).
[25] R. 461; 50 F.R.D. at 108.
[26] R. 462; 50 F.R.D. at 108.
[27] R. 464-65; 50 F.R.D. at 110.
[28] R. 440-41 (Ex. L).
[29] R. 443-45 (Ex. M).

Respondents appealed the trial court's rejection of their motions to intervene to the United States Court of Appeals for the Ninth Circuit. In an opinion entered December 11, 1972, the Court of Appeals reversed the District Court.[30] A petition for rehearing was denied[31] but the earlier opinion was withdrawn and a new opinion entered on January 31, 1973.[32] The Court of Appeals noted that the denial of the class was based on trial court's conclusion that the suit could best be handled through joinder of the claimants and that the class was not denied for failure to state a claim on behalf of its alleged members nor for lack of standing or for reasons of bad faith or frivolity. The Court of Appeals held that in such circumstances "as to members of the class Utah purported to represent and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they would be entertained on the merits. The requirements of § 5(b) were then met."[33]

The matter was ordered remanded to the District Court with instructions that the order be vacated and for further proceedings and motions.[34]

ARGUMENT

The decision of the United States Court of Appeals for the Ninth Circuit is not a proper case for review by this Court. It is a case of first instance, presenting no conflict with the decisions of other circuits. It is carefully restricted to the peculiar

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[30] State of Utah v. American Pipe & Const. Co., Civil Nos. 26,542 & 26,543 (filed Dec. 11, 1972) (this and the substituted opinion of Jan. 31, 1973 are hereinafter cited to the Petition for Writ of Certiorari ("Pet.")).

[31] Pet., App. A.

[32] Pet., App. D.

[33] Pet., App. D at 37-38.

[34] Pet., App. D at 39.

procedural history of Utah's class action and the subsequent applications for intervention. Despite petitioner's arguments to the contrary, it is supported by sound legal rationale and sound considerations of policy.

I. THE DECISION OF THE COURT OF APPEALS PRESENTS NO CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS.

The Court of Appeals was not faced with an abuse of discretion question. From its opinion it is clear that the lower court was prepared to allow the appellants to intervene so as to allege claims which in its mind were not barred by the statute of limitations; that is, those claims still within the four years provided by § 4B of the Clayton Act:[35]

> As the pleadings now stand, since petitioners have alleged a cause of action for the four years preceding December 12, 1969, when these motions were filed, this court could not now dismiss their complaints. In futuro, it can only rule on problems, discovery, etc., for periods after, as distinguished from prior to December 12, 1964, in the context of the statutory bar for any transactions or claims arising prior thereto. Therefore, as to all parties-plaintiff now before the court, the court's rulings do not with finality dispose of their cases.[36]

It is clear that the trial court did not deny intervention as an exercise of its discretion. Rather, intervention was denied because of the court's holding as to the statute of limitations. The Court of Appeals had no other question before it. The problems of abuse of discretion and possible conflicts arising therefrom are illusory.[37]

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[35] 15 U.S.C. § 15b.

[36] 50 F.R.D. at 110.

[37] The posture of the case before the Court of Appeals was similar to that of Brotherhood of Locomotive Firemen & Enginemen v. United States, ex rel. Deavers, 183 F.2d 65 (5th Cir. 1950), where the trial court had refused in-

Before the Ninth Circuit's decision no court had squarely decided, in reference to amended Rule 23, whether the Clayton Act statute of limitations is tolled for purported members of a class when the action is filed before but denied after the date that the limitations run.[38] The question has been considered or alluded to in dicta by some district courts,[39] but none of these statements is authoritative because the courts were deciding the propriety of the class action, not the effect of the class action on the statute of limitations. The most authoritative statement concerning this question, made by the Tenth Circuit in *Esplin v. Hirschi*,[40] is in complete harmony with the Ninth Circuit's decision, although it too must be characterized as dictum.

> In holding that the class action should have been allowed, it becomes necessary to comment briefly on the effect of this upon the statute of limitations issue. This court has held that the commencement of a spurious class action halts the running of the statute as against all members of the class. *Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561, 590 (10th Cir. 1962). The same will be true under newly amended Rule 23. Hence, the rights

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tervention on the basis of a remark of the appellate court, in a previous appeal, that no othre parties were necessary to adjudicate the issue. United States ex rel. Deavers v. Missouri, K. & T. R. Co., 171 F.2d 961 (5th Cir.). The Fifth Circuit, noting that the trial court was disposed to allow intervention but for its remark, stated that no question of discretion was involved. 183 F.2d at 67.

[38] The majority rule before the 1966 amendments to Rule 23 was that even in "spurious" class actions, a plaintiff could intervene after a timely filing of the action without reference to the statute of limitations. E.g., DePinto v. Provident Security Life Ins. Co., 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1954); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589-90 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962). York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

[39] Abercrombie v. Lum's, Inc., 345 F.Supp. 387, 394 (S.D. Fla. 1972); Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (S.D. N.Y. 1972); Buford v. American Finance Co., 333 F. Supp. 1243, 1252 (N.D. Ga. 1971); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968).

[40] 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

> of all class members are to be determined as if the class action had been allowed instead of being incorrectly terminated below. This means that the status of class members is to be determined by relation back to the date of the initiation of this suit in December, 1965.[41]

Even if the "distillate" of the dicta petitioner has collected did establish that members of an abortive class must rely upon the class action before the statute of limitations is tolled for them, there would be no conflict with the present decision. The Ninth Circuit has not precluded the possibility that reliance may be a relevant factor in certain appropriate cases, but has decided that reliance is not relevant in an action where the applicants for intervention were denied class status because, in the interests of efficient judicial administration of the case, the court preferred to have their claims presented by intervention and joinder.[42] When the class action is denied for other reasons — such as a failure of questions of law and fact common to the class or the inappropriateness of the representative parties[43] — reliance might be a sound basis for determining whether the statute of limita-

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[41] 402 F.2d at 101, n. 14.

[42] The difference from the instant case in the size and nature of the class and its relationship to the representative parties, as well as the procedural status of the action, should be noted in the decisions petitioner cites to show the importance of reliance: Rogers v. Coburn Finance Corp. of DeKalb, 54 F.R.D. 417 (N.D. Ga. 1972) (motion to reinstate class action denied in proceedings under Truth in Lending Act, 15 U.S.C. §1601); Ratner v. Chemical Bank New York Trust Co., *supra note* 39, (130,000 potential members of class, plaintiff only member fore the court, class action denied); Abercrombie v. Lum's, Inc. *supra* note 39, (class action denied, common issues did not predominate, plaintiff an insufficient representative); Buford v. American Finance Co., *supra* note 39, (class action under Truth in Lending Act denied); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., *supra* note 39, (class actions maintained as to certain purported classes and maintained with membership limited as to others).

[43] A failure to meet the requirements of Rule 23(a) (2), (3) or (4), F.R. Civ. Pro., obviously implies a much different relationship between the representative parties and the purported class than does a failure to meet the requirements of Rule 23(a) (1).

tions was tolled."[44] Nothing in the Court of Appeal's decision would prevent such developments in the law of the Ninth Circuit, nor contradict similar developments in other circuits.

The decision of the Court of Appeals is, by its own terms, closely restricted to the peculiar facts of this case:

> Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy); not for lack of standing of the representative, or for reasons of bad faith or frivolity. It was denied because, considering the size of the class and the nature of the claims of its members, it was felt that those claims could more efficiently be entertained through joinder of the claimants rather than by class treatment.
>
> Under these circumstances, we hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requirements of § 5(b) were then met.[45]

As the Court of Appeals points out, it cannot be seriously disputed that respondents, lesser governmental entities of the State of Utah, would have been proper members of the class,[46] had the District Court wished to entertain a class action, nor that Utah, through its Attorney General, would have been a proper party to represent their interests. Because the opinion is based on the nature of the class and the lower court's reasons for denying class

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[44] "[I]t may well be that . . . *at the very least* an opportunity should be presented for proof of reliance upon the pendancy of the purported class action sufficient to toll the statute of limitations." Philadelphia Elec. Co. v. Anaconda Am. Brass Co., *supra* note 34, at 461 (Emphasis added).

[45] Pet., App. D at 37-38.

[46] The trial court had previously agreed, 49 F.R.D. at 20.

action status to the suit, it is not a precedent that will encompass all cases involving applicants for intervention who, as members of a failed class, wish to have the statute of limitations tolled. Cases involving applicants from classes that failed for reasons other than the efficient administration of the case remain to be decided.

II. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT.

Petitioners argue that the Ninth Circuit's decision will "make the time period of every statute of limitation open-ended with no discernible period of repose."[47] In fact, as petitioners themselves make clear, the only indefinite period in such cases will be the time required by the trial court to determine whether the suit will be maintained as a class action. If the class fails, its members will have the same interval to file new actions or motions to intervene as remained between the date the class action was brought and the date the statute would have run. This is a discernible period.

Petitioners argue too that the decision will encourage the solicitation of claims by plaintiffs during the time the propriety of the class action is being decided.[48] In many class actions the solicitation of claimants is an abuse that the trial court must control. There is no reason, however, why the methods of control available to the trial court could not be employed during the period it is considering whether the class action should be maintained. The order prohibiting both parties from contacting members of the purported class,[49] which petitioners cite as evidence of the problem, would still be available.

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[47] Pet. at 17.

[48] Id. at 24.

[49] Manual for Complex and Multidistrict Litigation, §§ 1.61-1.62.

Contrary to petitioners' assertions, the instant case is not an example of such abuse. The Attorney General of the State of Utah is its chief legal officer with responsibilities running to the state's inferior governmental entities.[50] He would be remiss in his duties if he failed to apprise these entities of their just claims.

There is no danger that the instant decision will "exacerbate the problem of over use and abuse of the class action device" or "encourage the filing of invalid as well as valid class actions."[51] It bears repeating in reply to these arguments that the decision is limited to cases denying the class action on the sole basis that the claims can be handled more efficiently through joinder and intervention. As the Circuit Court points out, the number of claimants in a purported class will rarely be so small that as matter of law Rule 23(a)(1) does not apply.[52] If the other requirements of Rule 23(a) are met, i.e., if the applicants for intervention would have been proper members of the class had the trial court exercised its discretion to sustain it — then the problem of abuse and over use of the class action device is difficult to discern. Petitioners could not be asserting that a suit might be an abuse if it were brought on behalf of claimants with questions of law and fact common to them who were represented by parties with typical claims who would fairly and adequately protect their interests. Such a class might be so small that its claim to class action status could be dismissed as frivolous. But such possibilities pose no real danger to the class action device.

The chimerical problems of repose, solicitation, and abuse that petitioners see in the Court of Appeals' decision should be contrasted with the real problems that would arise from the Dis-

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[50] *See*, Utah Const. art. VII, §18; Utah Code Ann. § 67-5-1 (1953 Replacement).
[51] Pet. at 25.
[52] Pet., App. D at 38, n. 9.

trict Court's rule that claimants in respondents' position are barred. To affirm this result would make Rule 23 virtually inapplicable and useless in antitrust cases. No member of a purported class could safely refrain from filing a separate suit, for if he did refrain, he would incur the risk that defendants' inevitable challenge to the class status of the suit would prevail and that the order denying the class would be entered after the date ending the one year tolling provision of § 5(b). The rule would induce the filing of a large number of individual lawsuits and force the parties to pursue many concurrent suits. The policy of Rule 23, to conserve judicial time and dispose a large number of claims efficiently, would be subverted.[53]

The District Court's decision would put § 5(b) entirely within the discretion of the trial judge. If a class action is sustained, then, following the District Court's reasoning, each member of it, including an ignorant member "sleeping on his claim," would be before the court with his action commenced before the statute had run. If the class is denied, even on the grounds that its members' claims could more efficiently and practicably be litigated through intervention, then the members of it, including those who stand ready to present their claims as intervenors, were never before the court and their claims are barred. The Court of Appeals concluded that to allow this result "would be to empower the court, through the discretionary determination of whether the suit had been commenced or not, to render the statute of limitations applicable or not, as it sees fit. Considerations of order and certainty dictate that such questions should be resolved by rule of law rather than exercise of discretion."[54]

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[53] Esplin v. Hirschi, *supra* note 40; Dolgow v. Anderson, 43 F.R.D. 472 (E.D. N.Y. 1968).

[54] Pet., App. D at 38, n. 9.

This result also bears directly on the District Court's argument that it would be improper to toll the statute for the period the class action was being considered because such tolling would abridge petitioners' substantive right to have the claims against them limited by time. This abridgment, the court reasoned, would result from an application of the Rules of Civil Procedure that would violate 28 U.S.C. §2072,[55] which states that the Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive rights . . ." However, if members of a valid class have their action commenced when the class action is filed, while members of a failed class are never before the court when the class is denied after the period of suspension has ended, then *either* determination under Rule 23 affects the "substantive" right of the parties. The time after which defendant is protected by the time bar depends directly on a determination made under the Rules of Civil Procedure. The trial court reached the same result concerning the substantive procedural-dichotomy that it sought to avoid by denying the applications for intervention. It is impossible to avoid such contradictions if the procedure-substance classification is made to bear the burdens that should properly be placed on considerations of policy and fairness. In this case the contradiction is compounded, for in arrogating the statute of limitations to its discretion, the trial court removed a "substantive" right from the certainty of both the statutes and the Rules, and left it to be abridged or enlarged in the discretion of the court.

The decision of the Court of Appeals is in accord with the majority of cases that considered the problem of the relationship between class actions and statutes of limitations (prior to

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[55] 50 F.R.D. at 103.

the amendment of Rule 23 in 1966.)[56] As the Court of Appeals notes, the principal objection to the rule that a plaintiff could intervene after timely filing a class action without independently satisfying the applicable statute of limitations was removed by the new Rule. Because all class members are now bound by the judgment unless they affirmatively elect to remove themselves from the class, they can no longer await the outcome of the action to decide whether or not to intervene.[57] This change in Rule 23 strengthens the force of the pre-1966 decisions.

Petitioners accuse the Court of Appeals of their own *non sequiter*. The court did not determine that "(i)nasmuch as class members who do not participate in the action are now bound by the judgment therein under the current Rule 23, they should be allowed to intervene without satisfying the statute of limitations when class action status is denied."[58] The decision does not so beg the question. The Court reasoned that because "a civil matter is commenced by filing a complaint with the court," members of a class in respondents' position had satisfied the statute when the class action was filed. If the class had succeeded, there could be no question that respondents were properly before the court within the statute of limitations. When it failed *only because the trial court in its discretion wanted the claims presented in a different form of proceeding*, it could not

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[56] Escott v. Barclis Construction Corp., 340 F.2d 371 (2nd Cir. 1965), *cert. denied* 382 U.S. 816 (1966); DePinto v. Provident Security Life Ins. Co., 232 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589-90 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945). *Contra*, Pennyslvania Co. for Insurances v. Deckert, 123 F.2d 979 (3d Cir. 1941).

[57] See Pet., App. D at 36, n. 7, for the Court of Appeals' discussion.

[58] Pet. at 25.

be said that respondents were then never before the court, but only that they were out of court and again in exactly the same position as when the class action was filed.

CONCLUSION

The decision of the United States Court of Appeals is clearly correct and based upon sound principles of law and policy. It presents no conflict with the decisions of this court or the decision of other circuits. The petition for a writ of certiorari should be denied.

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